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No. 83-807

In the Supreme Court of the United States

OCTOBER TERM, 1983

CARL MICHAEL SIEBERT, PETITIONER

v.

D. T. BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner brought this action for damages against three IRS officials, contending that certain tax assessment and levy procedures violated his constitutional rights. The court of appeals affirmed an award of summary judgment in favor of respondents, holding them entitled to a defense of qualified immunity. Petitioner challenges that holding, making essentially the same arguments proffered by the petitioner in *Hall* v. *United States*, No. 83-514, in which certiorari was denied on November 28, 1983.

1. The pertinent facts may be summarized as follows: On July 7, 1972, petitioner was arrested on drug-related charges by Alabama state police (Pet. App. A4). The police seized the car petitioner was

driving and its contents, including a guitar and $460 in cash (*id.* at A4, F16). The police also seized $2,000 discovered in a search of petitioner's room at his parents' home (*id.* at F18).

Three days later, respondent Magill, as Acting District Director of Internal Revenue in Birmingham, Alabama, determined that petitioner's involvement in drug activities "tend[ed] to prejudice or to render * * * ineffectual proceedings to collect [his] income tax for the current * * * taxable year," within the meaning of Section 6851(a)(1) of the Code.[1] In accordance with that Section, Magill terminated petitioner's 1972 taxable year and declared his income tax for the first seven months of the year "immediately due and payable." Magill assessed a tax of $6,458 for that period, basing the assessment on an estimate of petitioner's earnings from drug sales (Pet. App. F22-F23).

Respondent Willingham, an IRS collection officer, served petitioner with the notice of termination and with a notice of levy under Code Section 6331(a) (Pet. App. F26). The latter notice informed petitioner that the property impounded by the Alabama police was being seized in partial satisfaction of the unpaid tax assessment (*id.* at A4-A5, F19-F20).[2] A notice of deficiency for the tax period at issue was sent to petitioner in August 1974, about two years later (*id.* at A5, F14). That notice was approved by respondent Baptist, the District Director of Internal Revenue in Birmingham (*id.* at F27-F28). Baptist

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2] Upon a later determination that the car was owned by petitioner's father, it was released (Pet. 9).

was absent from his office when the notices of termination and levy were served and took no part in their issuance (*id.* at F17).

Petitioner brought this action for damages in the United States District Court for the Northern District of Alabama, contending that respondents' enforcement of the Code's termination and levy procedures violated his constitutional rights (Pet. 15). His chief allegations were that respondents had conspired with the Alabama police "to interfere with [his] civil rights" (42 U.S.C. (& Supp. V) 1985), and that the IRS's failure to send him a notice of deficiency before terminating his tax year and levying on his property violated the Fifth Amendment (Pet. App. F44-F46). He also alleged violations of (and conspiracies to violate) the Fourth, Sixth, Eighth, and Fourteenth Amendments (Pet. 15).

The district court awarded summary judgment in favor of respondents (Pet. App. E1-E4, F1-F2). While expressing "serious doubt" that any of their actions violated the Constitution (*id.* at F32), the court held that they were entitled in any event to a defense of qualified immunity. It found that Magill, in "routinely * * * approving the termination [notice]" (*id.* at F25), and Baptist, in approving the notice of deficiency "upon the recommendations of his subordinates" (*id.* at F39), were acting within the scope of their duties in a good faith belief that their actions were proper (*id.* at F40-F41). It found that Willingham, in serving the notices and effecting the levy, was likewise acting "in good faith within the scope of his discretionary authority" (*id.* at F51).[3] It found that petitioner had introduced "no

[3] The court declined to grant summary judgment on the question whether Willingham, after seizing petitioner's guitar

evidence to show that [respondents] acted with subjective malice" (*id.* at F43, F25-F27, F39-F40, F51), "no evidence to show that [respondents] knew or reasonably should have known that they were violating [his] constitutional rights" (*id.* at F43, F46, F48 n.17), and "absolutely no evidence" to show that respondents had conspired with each other or with state officials to deprive him of his civil liberties (*id.* at F25-F26, F27-F28). The district court accordingly held that respondents were entitled to qualified immunity under *Wood* v. *Strickland*, 420 U.S. 308 (1975), and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).[4] The court of appeals affirmed in an unpublished judgment order (Pet. App. K1).

2. The courts below correctly applied the principles of qualified immunity to the facts of this case. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982),[5] this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitu-

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and "currency collection," had improperly disposed of them, holding that this question might raise a genuine issue of material fact (Pet. App. F48-F50). This question was subsequently decided against petitioner at trial (*id.* at H1-H2) and he does not pursue it here.

[4] The district court also dismissed petitioner's claim against Frank McCammon, an IRS official, holding that McCammon's alleged rudeness and refusal to investigate other taxpayers on petitioner's request did not violate his constitutional rights (Pet. App. E2-E3), and denied petitioner's motion to add Frank Hyatt, another IRS official, as a party defendant (*id.* at D1). Petitioner does not appear to seek review of these holdings.

[5] *Harlow* was decided after the district court's decision in this case, but before the court of appeals' affirmance.

tional rights of which a reasonable person would have known." 457 U.S. at 818. In July 1972, when the actions of which petitioner complains occurred, a taxpayer had no "clearly established right," under either the Internal Revenue Code or the Due Process Clause, to receive a notice of deficiency before termination or levy procedures were invoked against him. The only court of appeals that had considered the statutory question as of July 1972 had held that the Code afforded no such right,[6] and the district courts in the other circuits were divided.[7] In 1976, this Court interpreted Section 6851 (on analogy with Section 6861, governing jeopardy assessments) to require that the IRS send a deficiency notice to a taxpayer within 60 days after making a termination assessment and before selling the taxpayer's property. *Laing* v. *United States*, 423 U.S. 161 (1976). The Court reached that result, however, by a 5 to 3 vote, following reargument of the case, and after noting that it had granted certiorari to resolve what by then had become a conflict among the circuits on the question. 423 U.S. at 167, 169. Under these circumstances, it can scarcely be contended that petitioner in July 1972 had a "clearly established statutory right" to receive a notice of deficiency before the IRS levied on his guitar.[8]

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[6] *Williamson* v. *United States*, 31 A.F.T.R.2d (P-H) ¶ 73-456 (7th Cir. 1971).

[7] Compare, *e.g.*, *Irving* v. *Gray*, 344 F. Supp. 567, 571-572 (S.D.N.Y. 1972), aff'd, 479 F.2d 20 (2d Cir. 1973) (holding that a deficiency notice was not required), with *Schreck* v. *United States*, 301 F. Supp. 1265, 1267-1268, 1284 (D. Md. 1969) (holding that a deficiency notice was required).

[8] Since there was no "clearly established statutory right" at play in this case, the question of what effect the violation of

A taxpayer's right under the Due Process Clause to receive a notice of deficiency in these circumstances, furthermore, was even more speculative. No court had decided that question as of July 1972.[9] The only court to decide it subsequently has held that no such right exists.[10] And this Court specifically reserved the question in *Laing*.[11]

In short, because neither the statutory nor the constitutional law on the subject was "clearly established" at the time in issue, respondents under *Harlow* were plainly shielded from liability for civil dam-

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such a right would have on the assertion of a qualified immunity defense to a constitutional *Bivens* claim is not presented here. Cf. *Davis* v. *Scherer*, Nos. 82-5813 and 83-3034 (11th Cir. June 30, 1983), prob. juris. noted, No. 83-490 (Dec. 12, 1983).

[9] But cf. *Schreck*, 301 F. Supp. at 1281 (suggesting, without deciding, that failure to send a deficiency notice in termination situations "raises constitutional questions of equal protection and due process").

[10] *Laing* v. *United States*, 364 F. Supp. 469, 471 (D. Vt. 1973), aff'd, 496 F.2d 853, 854 (2d Cir. 1974), rev'd on other grounds, 423 U.S. 161 (1976). But cf. *Rambo* v. *United States*, 492 F.2d 1060, 1065 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976) (suggesting that failure to send a deficiency notice in termination situations "could very well raise" due process questions).

[11] 423 U.S. at 183-184 n.26. Compare *id.* at 187 (Brennan, J., concurring) (suggesting that Section 6851(a)(1) "falls short * * * of meeting due process requirements") with *id.* at 206 (Blackmun, J., dissenting) (concluding that due process does not require a deficiency notice in termination situations because "the taxpayer has a variety of remedies to test the validity of the Commissioner's action"). See *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (1931) (holding that the Constitution does not require a prepayment forum to adjudicate tax disputes).

ages. Even if some court should eventually hold that Magill, in approving the termination assessment, and Baptist, in not issuing a notice of deficiency until August 1974, violated petitioner's due process rights, neither respondent could "reasonably be expected to [have] anticipate[d such] subsequent legal developments, nor could [they] fairly be said to [have] know[n] that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818; *Hall* v. *United States*, 704 F.2d 246, 250 (6th Cir. 1983), cert. denied, No. 83-514 (Nov. 28, 1983). Similarly, the record here is barren of evidence that Willingham failed to follow prescribed procedures in serving the termination and levy notices, or otherwise violated any of petitioner's constitutional or statutory rights. The court of appeals thus correctly affirmed the district court's determination that respondents were entitled to a defense of qualified official immunity.

3. Petitioner asserts (Pet. 26-30) that respondents violated his rights by ignoring provisions of the Internal Revenue Manual which, on his view, required IRS personnel to send a deficiency notice to a taxpayer within 60 days after terminating his tax year. This contention is unfounded. The Manual as it then existed (see Pet. App. 011) did provide that IRS personnel should follow the same internal review procedures in making jeopardy and termination assessments. Administration (CCH) Internal Revenue Manual ¶ 4585.1(2) (1972). The Manual, however, did not require that a notice of deficiency be issued in termination cases; it enjoined that requirement only in jeopardy cases, simply tracking the language of Section 6861(b) as then in effect. Compare Administration (CCH) Internal Revenue Manual ¶ 4585.1(2) (1972) with *id.* at ¶ 4584.8.

4. Petitioner's contention (Pet. 19-32) that the district court misallocated the burden of proof as to qualified immunity is beside the point, since the trial judge found that petitioner's allegations were unsupported by *any* evidence sufficient to raise a triable issue of material fact. Respondents demonstrated that they had acted in subjective good faith and that they had no reason to believe that their actions violated any "clearly established rights" of petitioner (Pet. App. F40-F41, F51). The district court accorded petitioner (*id.* at F41-F43, F51) the opportunity to present competent summary judgment materials demonstrating a genuine issue of material fact on these questions. Viewing these materials in the light most favorable to petitioner (*id.* at F15), the district court concluded that he had failed to meet this burden (*id.* at F43-F46) and properly awarded summary judgment to respondents under Fed. R. Civ. P. 56(c).

5. Petitioner makes a number of miscellaneous contentions, all of which are frivolous. His assertion (Pet. 32) that the district court erroneously held the instant action barred by the statute of limitations is wrong and, in any event, is irrelevant since the court ruled against him on the merits. His discussion (*id.* at 42-45) of 42 U.S.C. 1985 and 1986 is likewise irrelevant, since the district court found that he had introduced "absolutely no evidence" of conspiracy (Pet. App. F25). And his charge that discovery was unduly curtailed (Pet. 46-51) is groundless, since the district court afforded him liberal discovery (Pet. App. F11) and allowed him to depose all of the respondents (as well as a host of others) before granting summary judgment (*id.* at F11-F12).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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